

GIBSON DUNN



Securities Regulation & Corporate Governance |
Fintech & Digital Assets Update

March 23, 2026

SEC Issues Interpretive Guidance on Application of Federal Securities Laws to Crypto Assets and Related Activities

While the Release is a welcome development and will likely provide more regulatory certainty to market participants in crypto assets, public comment will be needed to assist the Commission in further refining its analysis.

On March 17, 2026, the Securities and Exchange Commission ([SEC](#) or [Commission](#)) and the Commodity Futures Trading Commission ([CFTC](#)) jointly released interpretive guidance (Release No. 33-11412) ([Release](#)) to address the application of the Federal securities laws to crypto assets and related transactions. The CFTC joined in the Release to provide guidance that the CFTC and its staff will administer the Commodity Exchange Act ([CEA](#)) consistent with the SEC's interpretation, meaning that certain non-security crypto assets could meet the definition of "commodity" under the CEA. The Release expressly states that nothing in it alters the SEC's or CFTC's respective statutory authorities and does not reallocate jurisdiction between the agencies.

The Release took effect immediately upon its publication in the *Federal Register* on March 23, 2026 and expressly supersedes any prior statements by the Commission or its staff "on these topics,"^[1] including the Staff's *Framework for "Investment Contract" Analysis of Digital Assets*, which was issued in April 2019 under Chairman Clayton's leadership (the [2019 Framework](#)) and which market participants and courts^[2] have looked to in applying the *Howey* test. Nevertheless,

the Commission is “soliciting public comment on the views set forth in the interpretation,” and “[b]ased on the feedback received, the Commission may refine, revise, or expand upon the interpretation in order to provide further clarity regarding the Commission’s treatment of crypto assets under the Federal securities laws.”^[3] In other words, the Release may be the SEC’s definitive interpretation for now, but it is not final.

While the Release is a welcome development and will likely provide more regulatory certainty to market participants in crypto assets, public comment will be needed to assist the Commission in further refining its analysis. For example, in addressing the application of the *Howey* test to crypto assets, the Release acknowledges that the *Howey* jurisprudence disregards form for substance and “the emphasis should be on economic reality.”^[4] However, the Release’s analysis focuses exclusively on the “representations or promises” made by the issuer with respect to engaging in essential managerial efforts – and whether those representations or promises are such that the investor’s expectations of profit are “reasonable” – and fails to address how to apply the *Howey* test’s factors to the actual economic substance/structure of the crypto asset and the crypto system of which it is a part. As a result, it is incomplete and unlikely to be sufficient in assisting market participants in being able to conclude whether a crypto asset is, or is not, being offered as part of an investment contract.

Key Takeaways from the Release

I. Taxonomy and Vocabulary: Classification of Crypto Assets

The Release classifies crypto assets into five non-exclusive categories based on their characteristics, uses, and functions: (i) digital commodities; (ii) digital collectibles; (iii) digital tools; (iv) stablecoins; and (v) digital securities. Importantly, digital commodities, digital collectibles, and digital tools are expressly categorized as non-securities, though any non-security crypto asset can nonetheless be offered and sold subject to an investment contract, which itself is a security.

Digital Commodities are crypto assets intrinsically linked to and deriving their value from the programmatic operation of a “functional” crypto system, as well as supply and demand dynamics, rather than from an expectation of profits from the essential managerial efforts of others. The SEC identified numerous examples, including Bitcoin (BTC), Ether (ETH), Solana (SOL), Cardano (ADA), Dogecoin (DOGE), XRP (XRP), Avalanche (AVAX), Polkadot (DOT), and others. A crypto system is “functional” if its native crypto asset can be used on the system in accordance with its programmatic utility. A crypto system is “decentralized” if it functions and operates autonomously with no person, entity, or group of persons or entities having operational, economic, or voting control. Notably, the Release clarifies that governance tokens that allow holders to vote on technical or governance matters may still qualify as digital commodities.

Digital Collectibles are crypto assets designed to be collected and/or used that may represent or convey rights to artwork, music, videos, trading cards, in-game items, or digital representations of internet memes, characters, or trends. The Release expressly addresses “meme coins,” characterizing them as crypto assets typically acquired for artistic, entertainment, social, and cultural purposes, with value driven by supply and demand rather than essential managerial efforts of others. However, fractionalized digital collectibles that enable individuals to acquire fractional ownership interests could constitute securities if they involve essential managerial efforts from which purchasers would reasonably expect to derive profits.

Digital Tools are crypto assets that perform a practical function, such as memberships, tickets, credentials, title instruments, or identity badges. These often are non-transferable or “soul-bound” tokens, and their value derives from practical functionality. Examples include Ethereum Name Service domain names and CoinDesk’s ‘Microcosms’ NFT Consensus Tickets.

Stablecoins will be regulated by the GENIUS Act once it takes effect, which will not occur until the earlier of 18 months from the date of enactment (July 18, 2025) or the date that is 120 days after the date on which the primary Federal payment stablecoin regulators issue any final regulations implementing the GENIUS Act. When it does, the Release provides that any “payment stablecoin issued by a permitted payment stablecoin issuer” (as defined in the GENIUS Act) will be categorically excluded from the definition of “security.” Until then, the Release defaults to the Division of Corporation Finance’s analysis in its April 2025 Statement on Stablecoins (the [Staff Stablecoin Statement](#)), which defines a category called “Covered Stablecoins.”^[5] The Release provides the interpretation that the offer and sale of “Covered Stablecoins” does not involve the offer and sale of securities. The Release does not address stablecoins other than Covered Stablecoins as described in the Staff Stablecoin Statement.

Digital Securities (commonly known as “tokenized” securities) are financial instruments enumerated in the definition of “security” that are formatted as or represented by a crypto asset, where the record of ownership is maintained on one or more crypto networks. The SEC emphasizes that a security remains a security regardless of whether it is issued offchain or onchain.

II. Crypto Assets as Investment Contracts; Protocol Mining, Staking, and Wrapping

In addition to providing this taxonomy, the Release addresses the application of the federal securities laws to (i) crypto assets that are the subject of an “investment contract,” and (ii) certain common crypto asset activities—namely, protocol mining, protocol staking, and “wrapping.”

Investment Contract

With respect to crypto assets that are the subject of an investment contract, the SEC emphasizes that the relevant inquiry remains whether the offer or sale of a crypto asset satisfies the test set forth in *SEC v. W.J. Howey Co.* 328 U.S. 293 (1946) (*Howey*), namely whether it involves (i) an investment of money, (ii) in a common enterprise, (iii) with a reasonable expectation of profits, (iv) to be derived from the efforts of others.

The Release reiterates that a crypto asset is not itself a security in all circumstances; rather, the relevant inquiry focuses on the offer, sale, or scheme involving the crypto asset. Consistent with *Howey*, the SEC emphasizes that the “efforts of others” prong turns on whether purchasers reasonably expect that the essential managerial efforts of the issuer will drive the asset’s value. In this regard, the Release places particular weight on how the issuer presents the offering to purchasers, emphasizing that detailed representations or promises about business plans—such as specific milestones, timelines, information about personnel, sources of funding and other necessary resources, and how holders of the asset will profit from those efforts—are more likely to create a reasonable expectation of profits based on the issuer’s essential managerial efforts, whereas more general representations lacking an “actionable business plan” are less likely to

create such reasonable expectations.

Importantly, the Release also underscores that, as the crypto asset and system of which it is a part changes or develops, these changes or developments may impact the securities law analysis and conclusion under *Howey*. In particular, a crypto asset that is initially offered and sold as part of an investment contract may, depending on subsequent developments, “separate” from the issuer’s representations or promises, at which point transactions involving the asset would no longer be subject to the Federal securities laws. The SEC notes that this may occur, for example, where previously identified managerial efforts are completed or abandoned—whether due to the network achieving its intended functionality or, conversely, failing to do so. In this respect, the Release reinforces that the *Howey* analysis is not static, but instead must be reassessed based on changing facts and circumstances.

This discussion, however, materially departs from prior Commission and staff statements by focusing the analysis exclusively on the “representations or promises to undertake the essential managerial efforts from which a purchaser would reasonably expect to derive profits.”^[6] For example, the possible factors highlighted in the 2019 Framework that would be relevant to the “efforts of others” prong of the *Howey* test – such as whether the “Active Participant” has the ability to realize capital appreciation from the value of the digital asset or whether the “Active Participant” owns or controls ownership of the intellectual property rights of the network or digital asset – would seem no longer to apply since the Release expressly says that it supersedes the 2019 Framework. Rather, the Commission’s new analysis is about disclosure: what did the issuer represent or promise with respect to its essential managerial efforts? After the investment contract is offered and sold, the analysis continues. Has the issuer satisfied or failed to deliver on that representation or promise? If so, then at that point, the investment contract may no longer exist.

Protocol Mining and Protocol Staking

The Release clarifies that Protocol Mining and Protocol Staking, as defined and described in the Release, do not involve securities transactions because participants generally rely on their own efforts and resources, such as contributing computational power or staking digital assets to validate transactions, rather than on the essential managerial efforts of others. In this regard, the Release characterizes rewards earned from these activities as reflecting compensation for services provided, rather than profits derived from the efforts of a third party. The Release similarly concludes that “wrapping,” as defined and described in the Release, does not involve a securities transaction where a wrapped token merely represents a one-for-one claim on an underlying non-security crypto asset that is not itself subject to an investment contract. In such cases, the wrapped token does not carry an independent expectation of profit or involve reliance on the managerial efforts of others, and the wrapping process is characterized as an administrative or ministerial mechanism to facilitate interoperability rather than an investment scheme.

III. Use of Airdrops of Crypto Assets

The Release attempts to provide clarity regarding the securities law status of certain crypto asset disseminations known as “airdrops.” An “airdrop” is a means for crypto asset issuers to disseminate their crypto assets in exchange for no consideration, typically by transferring crypto

assets to specific cryptographic wallets or other addresses. According to the Release, airdrops are often deployed as tools to promote a software application, incentivize user engagement, and support the decentralization of crypto systems. By distributing tokens broadly—whether to reward early adopters, build community participation, or expand governance—issuers seek to enhance network effects and increase the utility and adoption of their platforms. This context is critical to understanding the securities law analysis, as it underscores that many airdrops are intended to facilitate ecosystem development and user involvement, rather than to function as investment offerings.

The interpretation applies only to airdrops of non-security crypto assets to recipients who do not provide the issuer with money, goods, services, or other consideration in exchange for the airdropped crypto asset. More specifically, recipients must not bargain for or choose to provide such consideration in exchange for the airdropped non-security crypto asset for the interpretation to apply. If this is the case, then the Release takes the interpretive position that the first element of the *Howey* test—requiring an “investment of money”—is not satisfied, and therefore no investment contract exists. In other words, because the issuer has not received any consideration, the Federal securities laws do not apply, even if the issuer makes representations and promises about its essential managerial efforts to develop profits for holders of the airdropped crypto assets.

Notably, the Release highlights important timing and messaging considerations regarding airdrops. Where recipients have provided consideration to the issuer prior to the announcement of the airdrop, and recipients are not required to provide any further consideration after the announcement to obtain the airdropped crypto asset, then the SEC would not view such prior consideration as being provided in exchange for the airdropped asset. However, if recipients must fulfill further conditions subsequent to the announcement—such as buying a specific crypto asset, purchasing goods or services, or performing a specific task—then that would satisfy the “investment of money” prong, thereby resulting in the airdropped crypto asset being deemed to be a security.

Importantly, although a crypto asset disseminated in an airdrop may not itself be subject to an investment contract because there is no investment of money, there may be an investment contract associated with the crypto asset created in connection with other transactions. For example, if the issuer has conducted airdrops of crypto assets in addition to offerings of the crypto asset for cash. In such cases, the airdrop recipient’s subsequent sale of the same crypto asset for cash in a secondary market transaction could constitute a securities transaction, for which registration or an exemption from registration would be required in order to render the resale lawful.

IV. CFTC Guidance and Broader Market-Structure Implications

The CFTC’s contribution to the Release is limited but important. The Release states that the CFTC and its staff will administer the CEA consistent with the SEC’s interpretation, and that certain non-security crypto assets could meet the CEA definition of “commodity.” The Release also expressly states that nothing in it alters the SEC’s or the CFTC’s respective statutory authorities. Although the Release uses the term “digital commodity” as a taxonomy label in an economic and commercial sense, it says more broadly that any non-security crypto asset (other than a payment stablecoin issued by a permitted payment stablecoin issuer under the GENIUS

Act) could meet the CEA's definition of "commodity."

From a practical standpoint, this means that a crypto asset falling outside the SEC's securities framework is not outside federal regulation. While the Release does not establish a comprehensive CFTC spot market regime for non-security crypto asset commodities, the CFTC retains general regulatory over commodity derivatives and certain leveraged, margined or financed retail commodity transactions and retains anti-fraud and anti-manipulation authority over spot commodities.

V. Areas of Continued Regulatory Uncertainty

The Release acknowledges several areas that remain outside its scope or are left for future consideration.

Staking Activities Outside the Safe Harbors. While the Release provides a framework for certain staking arrangements, several common staking activities remain outside its scope. First, it explicitly does not address "restaking," which is the process that allows digital commodities staked on their associated crypto network to be used on additional crypto systems. Second, the Release does not apply where a Custodian or Liquid Staking Provider exercises discretion in selecting whether, when, or how much of a Depositor's digital commodities to stake. Third, arrangements where a Custodian or Liquid Staking Provider guarantees or otherwise sets the amount of rewards owed to Depositors are explicitly carved out. Finally, where a Liquid Staking Provider provides the means by which a Staking Receipt Token can be used to generate additional returns beyond Protocol Staking rewards, those activities fall outside the scope of the Release. Market participants engaged in these activities will need to continue evaluating their arrangements under existing securities law frameworks until further guidance is issued.

Non-Covered Stablecoins. The Release also leaves unresolved the securities law status of stablecoins that are not "Covered Stablecoins" as described in the Staff Stablecoin Statement and payment stablecoins under the GENIUS Act. Other types of stablecoins—such as algorithmic stablecoins or stablecoins that pay yield to holders—are not addressed and may still meet the definition of "security" depending on the facts and circumstances. Issuers and platforms dealing with these non-covered stablecoins should carefully assess their regulatory obligations.

Hybrid or Uncategorized Crypto Assets. The Release acknowledges that given variations in crypto assets and the constantly evolving nature of the markets, there may be crypto assets that do not fall within any of the five categories, as well as crypto assets with hybrid characteristics that may fall within more than one category. This acknowledgment signals that the taxonomy is not exhaustive, and novel token designs or multi-functional assets may still face regulatory uncertainty. Based on feedback received, the SEC may refine, revise, or expand upon the interpretation to provide further clarity.

VI. Conclusion

The Release is notable as part of the SEC's and CFTC's broader harmonization effort on crypto market structure (even though this release itself is primarily an SEC securities-law interpretation accompanied by limited CFTC guidance).

The key takeaways from the Release are:

- The majority of crypto assets and transactions involving crypto assets are not securities, although transactions involving those assets may still be securities transactions if they are offered or sold as part of an investment contract;
- Although *Howey* and its jurisprudence remain binding precedent, the SEC’s application of *Howey*’s investment contract analysis has shifted and now significantly focuses on the “representations or promises” made by the issuer with respect to engaging in essential managerial efforts;
- Airdrops – if conducted according to the guidance in the Release – can enable issuers to publicly distribute, without registration, crypto assets that would otherwise be investment contracts, although the resale of those same crypto assets for cash would require registration or qualify for an exemption from registration; and
- Further public input and refinement by the SEC of this Release will likely be needed to clarify how *Howey* applies to the offer and sale of crypto assets.

[1] 91 FR 13714 (Mar. 23, 2026). See Release at fn. 21, fn. 62, fn. 79, fn. 99 and fn. 100.

[2] See, e.g., *Sec. & Exch. Comm’n v. Binance Holdings Ltd.*, 738 F. Supp. 3d 20 (D.D.C. 2024); *Dettmering v. VBit Techs. Corp.*, 2023 WL 4824955 (D. Del. July 27, 2023), *report and recommendation adopted*, 2023 WL 6211243 (D. Del. Sept. 25, 2023) (each citing the 2019 Framework in discussing whether digital asset offerings may constitute securities).

[3] Release at 9.

[4] *Id.* at 10.

[5] “Covered Stablecoins” under the statement are stablecoins (i) designed to maintain a 1:1 value with the U.S. dollar, (ii) redeemable for U.S. dollars on a 1:1 basis, and (ii) backed by low-risk and readily liquid assets held in reserve.

[6] Release at 25.

The following Gibson Dunn lawyers prepared this update: Thomas Kim, Mellissa Duru, Jeffrey Steiner, Sara Weed, Tiffany Mickel, and Nathan Marak.

Gibson Dunn’s lawyers are available to assist with any questions you may have regarding these developments. To learn more, please contact the Gibson Dunn lawyer with whom you usually

work, the authors, or any of the following leaders and members of the firm's Securities Regulation & Corporate Governance, Fintech & Digital Assets, or Administrative Law & Regulatory practice groups:

Securities Regulation & Corporate Governance:

Aaron Briggs – San Francisco, CA (+1 415-393-8297, abriggs@gibsondunn.com)
Mellissa Campbell Duru – Washington, D.C. (+1 202.955.8204, mduru@gibsondunn.com)
Elizabeth Ising – Washington, D.C. (+1 202-955-8287, eising@gibsondunn.com)
Thomas J. Kim – Washington, D.C. (+1 202-887-3550, tkim@gibsondunn.com)
Brian J. Lane – Washington, D.C. (+1 202-887-3646, blane@gibsondunn.com)
Julia Lapitskaya – New York, NY (+1 212-351-2354, jlapitskaya@gibsondunn.com)
Ronald O. Mueller – Washington, D.C. (+1 202-955-8671, rmueller@gibsondunn.com)
Michael Titera – Orange County, CA (+1 949-451-4365, mtitera@gibsondunn.com)
Geoffrey E. Walter – Washington, D.C. (+1 202-887-3749, gwalter@gibsondunn.com)
Lori Zyskowski – New York, NY (+1 212-351-2309, lzyskowski@gibsondunn.com)

Fintech & Digital Assets:

Jason J. Cabral – New York (+1 212.351.6267, jcabral@gibsondunn.com)
M. Kendall Day – Washington, D.C. (+1 202.955.8220, kday@gibsondunn.com)
Osman Nawaz – New York, NY (212.351.3940, onawaz@gibsondunn.com)
Rosemary Spaziani – New York, NY (+1 212.351.6255, rspaziani@gibsondunn.com)
Jeffrey L. Steiner – Washington, D.C. (+1 202.887.3632, jsteiner@gibsondunn.com)
Sara K. Weed – Washington, D.C. (+1 202.955.8507, sweed@gibsondunn.com)

Administrative Law & Regulatory:

Matt Gregory – Washington, D.C. (+1 202.887.3635, mgregory@gibsondunn.com)
Nick Harper – Washington, D.C. (+1 202.887.3534, nharper@gibsondunn.com)

Attorney Advertising: These materials were prepared for general informational purposes only based on information available at the time of publication and are not intended as, do not constitute, and should not be relied upon as, legal advice or a legal opinion on any specific facts or circumstances. Gibson Dunn (and its affiliates, attorneys, and employees) shall not have any liability in connection with any use of these materials. The sharing of these materials does not establish an attorney-client relationship with the recipient and should not be relied upon as an alternative for advice from qualified counsel. Please note that facts and circumstances may vary, and prior results do not guarantee a similar outcome.

If you would prefer NOT to receive future emailings such as this from the firm, please reply to this email with "Unsubscribe" in the subject line.

If you would prefer to be removed from ALL of our email lists, please reply to this email with "Unsubscribe All" in the subject line. Thank you.

© 2026 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit our [website](#).